UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC. Debtors	CASE NO. 96-61376 Chapter 11 Substantively Consolidated

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

In a motion filed on December 23, 1998, Chapter 11 Trustee Richard C. Breeden (the "Trustee") has sought the Court's approval, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), of a collection of settlements between the Consolidated Estates of The Bennett Funding Group, Inc. (the "Debtors" or the "Bennett companies") and various parties with whom the Trustee is engaged in litigation (the "Settlement").[1] By an order dated March 18, 1999, the Court granted the Trustee's motion in part, denied the motion in part, and reserved judgment in part. *In re The Bennett Funding Group, Inc.*, Case No. 96-61376 (Bankr. N.D.N.Y. March 18, 1999). Presently before the Court is that part of the original Settlement Motion on which judgment was previously reserved , which sets

[1] By an order dated July 25, 1997, this Court substantively consolidated the estates of eight interrelated companies formerly controlled by the Bennett family of Syracuse, New York. The consolidated estate (the "Estate") is comprised of The Bennett Funding Group, Inc. ("BFG"), Bennett Receivables Corporation, Bennett Receivables Corporation II, Bennett Management & Development Corporation ("BMDC"), The Processing Center, Inc. ("TPC"), Resort Service International, Ltd., American Marine International, Ltd., and Aloha Capital Corporation.

out a compromise between the Trustee, certain lenders who hold claims against the Bennett Estate and who have been certified as class action plaintiffs and defendants pursuant to Fed.R.Bankr.P. 7023 and Rule 23 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") (the "Investors"), and Assicurazioni Generali S.p.A. and its related entities ("Generali") (collectively, the "Settling Parties").

The Settlement Motion was initially argued on January 28, 1999 and again on February 25, 1999 (respectively, the "January Hearing" and the "February Hearing"). In response to objections over certain elements of the Settlement, particularly the breadth of a proposed non-debtor injunction, the Settling Parties substantially revised a portion of the Settlement by an Agreement Modifying Settlement, which was filed with the Court on March 12, 1999 (the "First Modifying Agreement"). On March 25, 1999, the Court held argument on the Settlement as amended by the First Modifying Agreement, at which time further objections were heard (the "March Hearing"). At the March Hearing, the Settling Parties orally agreed to make further changes to the Settlement in order to satisfy the remaining objections of Sage Rutty & Company, Inc. ("Sage Rutty") and Brighton Securities Corp. ("Brighton"), two non-settling brokerages with contingent claims against Generali. At the close of the hearing, the Court orally granted the Settlement Motion as amended and subject to the proposed modification, indicating that it would issue a written decision. The modifications which were agreed to at the March Hearing were then formalized by an Agreement Further Modifying Settlement (the "Second Modifying Agreement"), which was executed by the Settling Parties on March 30, 1999, and submitted to the Court on April 1, 1999.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(b)(1), and 157(b)(2)(A), (C), and (O).

STATEMENT OF FACTS

The Settlement presently before the Court resolves a significant part of the litigation arising out of the massive fraud allegedly perpetrated by the Debtors and their officers, the relevant details of which are stated more fully in the Court's Decision of March 18, 1999. In pertinent part, it is alleged that from at least 1990 until 1996, the Debtors originated and marketed fraudulent leases and securities to the public, many of which were purportedly insured or guaranteed through policies issued by Generali (the "Policies"). On many of the Policies, the individual Investor who purchased the security would be listed only as a "certificate holder," while the designated loss payee was most often TPC or another Bennett company. In a minority of cases, the designated loss payees were the brokers through whom the Bennetts marketed their investments (the "Brokers"), among whom were Sage Rutty and Brighton. Generali also issued insurance policies pursuant to financing transactions between the Debtors and certain banks (the "Banks"); in these cases, the loss payee would be the Bank for whose benefit the Policy was allegedly issued.

On January 8, 1998, the Trustee filed a First Amended Complaint (the "Complaint") in the

adversary proceeding captioned as *Breeden v. Generali U.S. Branch*, Adv. No. 96-70195A (the "Generali Adversary"). In pertinent part, the Complaint alleged that the shortfalls in revenue generated by the leases had given rise to an insurable loss under the Policies, and that the Estate was entitled to collect the proceeds of the Policies on behalf of the Debtor loss payees. The first count of the Complaint accordingly sought compensatory damages from Generali on a breach of contract theory for its failure to make payment under the Policies, while the second count sought a declaratory determination of rights as against all other parties asserting an interest in the Policies, including Generali, the Investors, the Brokers, and the Banks. Counts three, four, and five of the Complaint were tort claims asserted directly against Generali, which alleged that Generali had either negligently or intentionally aided the fraud perpetrated against the Debtors by the Debtors' own officers.

In response to the Trustee's tort claims, Generali has asserted (among other defenses) that it had no knowledge of the Debtors' fraud and was under no obligation to investigate or discover it. As to the contract claims, Generali argues that the Policies are void and unenforceable because of the Debtors' fraud, that the Debtors had failed to comply with the conditions of the coverage, and that no insurable loss has taken place. Generali also asserts that its liability is limited by a so-called "Second Trigger" provision in the insurance contract, pursuant to which it was obliged to pay under the Policies if and only if the Debtors first defaulted on their payments to the Investors. Because the Debtors in most cases met their obligations to the Investors up until the moment they entered bankruptcy, the Second Trigger would presumably limit Generali's liability to those lease shortfalls that took place post-petition. In addition, Generali has argued that its liability is further limited by a self-insured retention clause in its contract with the Debtors, which functioned as the

rough equivalent of a deductible on the Policies, as well as by a "hold harmless" clause under which the Debtors agreed to reimburse Generali for losses arising from fraud.

By way of a counterclaim and cross claim, Generali's answer to the Trustee's complaint alleged that it was likely to be subject to conflicting claims for payment under the Policies from the Estate, the other loss payees, and the certificate-holder Investors. Accordingly, Generali's counterclaim and cross claim asserted an interpleader action against the Banks, the Brokers, and the Investors, seeking determinations of its liability and its right to reimbursement from the Estate.

On November 6, 1996, two certificate-holder Investors filed a motion in this Court seeking class certification pursuant to Fed.R.Bankr.P. 7023 and Fed.R.Civ.P. 23(b)(1) and (2) on behalf of those Investors who had been joined as defendants in the declaratory causes of action asserted by the Trustee and Generali (the "Defendant Class"). This motion was granted by an order of the Court dated May 30, 1997. Pursuant to the Order for Certification, the Defendant Class was defined as:

> All creditors of the Debtors who assert claims against Generali in connection with their transactions with the Debtors, except the following: (1) persons or entities who are named as loss payees on certificates of insurance issued with respect to policies issued by Generali to The Bennett Funding Group, Inc. and Resort Services Company, Inc.; and (2) persons or entities who are not named as loss payees but who are banks, bank and trust companies, trust companies, savings and loan associations or other financial institutions (collectively "non-loss payee financial institutions"), provided that such non-loss payee financial institutions appear and answer the Adversary Complaint in this proceeding no later than May 30, 1997 (unless such date is extended by the Court). Such exceptions include, without limitation, all Crossclaim Defendants listed in Paragraph 6 of Generali's Amended Answer And Amended Counterclaim/Crossclaim dated December 18, 1996.

Because of the declaratory nature of the causes of action asserted against it, the Defendant Class was certified as a mandatory class action pursuant to Fed.R.Civ.P. 23(b)(1) and (2), and

individual Investors were consequently not afforded an opportunity to opt out.

Generali has also been sued by various Investors in a series of actions currently pending before the Honorable John E. Sprizzo of the United States District Court for the Southern District of New York and captioned as *In re Bennett Funding Group, Inc. Securities Litigation (No. II)*, M.D.L. No. 96-CIV-2583 (S.D.N.Y.) (the "District Court Litigation"). On April 29, 1997, Judge Sprizzo granted a motion to certify a Fed.R.Civ.P. 23(b)(3) class action on behalf of "[a]ll persons and entities (other than defendants, members of their immediate families, heirs, affiliates, successors and assigns) who purchased Bennett Securities or `rolled over' investments into Bennett Securities during the period from March 29, 1992 through March 29, 1996" (the "Plaintiff Class"). The reference to "defendants" in the preceding certification order would appear to exclude those Brokers who are listed as loss payees on the Policies, most (if not all) of whom have been sued as defendants in the District Court litigation.[2]

Because the Plaintiff Class was certified as a non-mandatory class action under Fed.R.Civ.P. 23(b)(3), individual investors were permitted to opt out and retain their separate rights of action against Generali. It appears that although a majority of the Investors have consented to pursue their claims through the Plaintiff Class, at least some have executed requests for exclusion which had not been rescinded by the time the Settlement Motion was presented to this Court. Among these opt-outs are a number of certificate-holder Investors represented by William F. Costigan, Esq., who refer to themselves as the "Abatemarco Group" and who are

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[2] It is less clear whether the District Court order certifying the Plaintiff Class was intended to encompass the Banks as well as individual Investors. However, even if the Banks were included in the definition of the class, Fed.R.Civ.P. 23(c)(2) would have required that they receive notice and an opportunity to request exclusion. At least with respect to the Banks that have appeared in opposition to the Settlement Motion, it does not appear that this was ever done.

currently pursuing a separate non-bankruptcy lawsuit against Generali. But while the Abatemarcos obviously cannot have their rights altered by the Plaintiff Class, they are nevertheless full (if somewhat unwilling) members of the mandatory Defendant Class, the actions of which are binding on them with respect to the equitable causes of action for which the class was certified.

TERMS OF THE GENERALI SETTLEMENT

The controlling terms of the Generali Settlement are spread out over seven separate documents: a Stipulation of Settlement ("Stipulation") executed on December 21, 1998 by counsel for the Trustee, Generali, the Plaintiff Class, and the Defendant Class; a Memorandum of Understanding ("MOU") previously executed by the same parties on October 19, 1998, and incorporated into the Stipulation by reference; a letter by counsel for Generali to counsel for the Trustee, dated November 16, 1998; an undated Agreement in Supplementation of the MOU; the First Modifying Agreement, the Second Modifying Agreement, and a proposed Final Order and Judgment ("Final Order").

Although the Final Order is not mentioned among the documents comprising the Settlement agreement in the opening paragraph of the Stipulation, its content is explicitly incorporated into the Generali Settlement by Stipulation ¶ ¶ 12(b) and 14, which provide:

12. In consideration of the Settlement . . .

> . . . (b) the Defendant Class' claims against Generali and others shall be released in the Bankruptcy Court Final Order And Judgment entered in the

Bankruptcy Court in the form annexed hereto as Exhibit G.

> 14. At the hearing for approval of the Settlement by the Bankruptcy Court, the Parties jointly shall apply for entry of an order and judgment of dismissal in the form annexed hereto as Exhibit G. Entry of the Bankruptcy Court Final Judgment in this form is a condition of the Settlement.

The Final Order has been revised twice since the execution of the Stipulation. These revisions became effective pursuant to the First and Second Modifying Agreements, both of which were signed by representatives of all parties to the Stipulation.

A substantially similar proposed Final Order and Judgment was submitted to the District Court for the Southern District of New York as part of the District Court Litigation (the "District Court Final Order"). Pursuant to ¶ 13 of the Stipulation, the Settlement will become binding on the parties if and only if both this Court and the District Court sign the respective Final Orders.

1. General Provisions.

At its core, the Settlement provides that Generali will pay $125 million to the Estate in full satisfaction of all pending and potential Bennett-related contract claims asserted against it and its officers by the Trustee or by the Investors. While the Settlement also releases Generali from all tort claims that may be asserted by the Trustee and those Investors who are members of the Plaintiff Class, it will not release pending or potential tort claims by those investors who have opted out of the Plaintiff Class. In addition, the Settlement requires Generali to withdraw a proof of claim that it has filed against the Estate based on its alleged right of reimbursement against the Debtors. Lastly, the Settlement provides for a general release of any Generali-related claims that might be asserted by or against Resort Funding, Inc. ("RFI") and Equivest Finance, Inc.

("Equivest"), two non-bankrupt subsidiaries of the Consolidated Estate.

Payment to the Estate would be disbursed through a letter of credit (the "Settlement Fund"), which the Trustee would become entitled to draw upon as soon as a long list of conditions set out in the MOU was met.[3] While the entire amount of the Settlement Fund would pass through the Chapter 11 Estate, the Generali Settlement does not provide for a final allocation of the settlement proceeds between certificate-holding Investors and the general body of unsecured creditors. Instead, the Trustee has in effect agreed with the Investor Classes that this issue will be postponed to a later stage of the Bankruptcy proceedings.

In addition to the far-reaching releases required by the MOU, the Stipulation also provides for the creation of a Special Litigation Reserve Account ("Reserve Account"), which would be used to indemnify Generali for Bennett-related judgments incurred after the approval of the Settlement.[4] The funds in the Reserve Account would be credited against the proposed $125

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[3] Pursuant to ¶ 1 of the MOU, these conditions include:
(a) the dismissal with prejudice of claims against Generali (as set out in the Final Order) asserted by the Estate, RFI, Equivest, the Plaintiff Class, the Defendant Class, Halpert, and a threshold number of Investors who had previously opted out of the Plaintiff Class;
(b) a "best efforts" attempt by the Trustee to obtain an injunction as part of the final plan of reorganization which would bar all claims against Generali pertaining to BMDC by any certificate holder or loss payee, with the exception of certain non-settled banks.
(c) the voluntary discontinuance of certain adversary proceedings commenced by the Trustee against Generali-insured individuals;
(d) the voluntary discontinuance of certain adversary proceedings commenced by the Trustee against Generali-insured non-settling Banks;
(e) a determination by the District Court that the Settlement is binding all members of the Plaintiff Class; and
(f) a determination by this Court that the Settlement is binding on all entities of the Bennett Estate and all members of the Defendant Class.

[4] The exact amount of the proposed Reserve Account fund has been filed under seal with the Court.

million settlement award, and any funds in the Reserve Account not drawn upon by the year 2002 would be turned back over to the Estate.

2. The "Channeling Injunction."

Under ¶ 4 of the proposed Final Order, all claims identified by the parties as "Settled Claims" are to be "dismissed, on the merits and with prejudice." The term "Settled Claim" is defined in ¶ 1 of the same document, which provides that:

> "Settled Claim" means:
>
> (b) . . . each and every claim of each and every member of the Defendant Class and of each and every Loss Payee Broker, excluding Brighton Securities and Sage Rutty in their capacities as loss payees on behalf of their customers but including Brighton Securities and Sage Rutty in all other capacities including without limitation as certificate holders, against Generali seeking payment of proceeds of any insurance policy issued by Generali to BFG or otherwise alleging Generali's breach of its obligations under any such policy or any declaration or certificate issued in connection with any such policy.[5]

"Broker Loss Payees" is further defined by the Final Order as "brokers who were listed as loss payees on certificates referencing insurance policies issued by Generali U.S. Branch to the Bennett Funding Group, Inc. or its affiliates and that list a customer of the broker as certificate holder."

Both at the hearings and in the Trustee's motion papers, the enjoining provision of the

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[5] An earlier version of the Channeling Injunction was substantially modified by the First Modifying Agreement, which narrowed the injunction so as to affect only contract claims. The exceptions for Sage Rutty and Brighton Securities were added to the Final Order by the Second Modifying Agreement.

Final Order was referred to, somewhat inaccurately, as a "channeling injunction."[6] Because it enjoins all members of the Defendant Class, and hence practically all certificate-holding Investors, the Bankruptcy Court Channeling Injunction is considerably broader than a parallel provision contained in the District Court Final Order, which purports to bind only those investors who have joined the non-mandatory Plaintiff Class.[7]

3. Treatment of Former Investors and Banks.

In addition to the injunction against further litigation of the Settled Claims, the Settlement attempts to shield Generali by requiring the Trustee to abandon certain pending adversary proceedings that might indirectly increase the liability of Generali to third parties. Among the actions affected are certain adversary proceedings commenced by the Trustee against the Banks, which seek to recover pre-petition loan payments as fraudulent and preferential transfers under §§ 544, 547, and 548 of the United States Bankruptcy Code, 28 U.S.C. §§ 101-1330 ("Code") and related state law. Pursuant to subsection (d) of the MOU (the terms of which are incorporated into ¶ 16 of the Final Order and Judgment), the Generali Settlement is accordingly conditioned on the

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[6] Under the usual meaning of the term, a "channeling injunction" is an order issued by a bankruptcy court in the mass tort context, pursuant to which future tort victims whose claims are based on the debtor's pre-petition conduct are directed to proceed against a debtor-funded trust fund rather than from the reorganized debtor directly. *See* 6A NORTON BANKRUPTCY LAW AND PRACTICE 2D § 154:19 (1997). While the injunction at issue in the present case differs from the classic tort channeling injunction in several important respects, the Court will adopt the Trustee's terminology as a matter of convenience.

[7] The language of the actual injunction is identical in both Final Orders. The difference in the effect of the two injunctions arises out of the definition of "Settled Claims," which is limited in the Bennett Securities Final Order to those claims asserted by members of the Plaintiff Class.

issuance of an order by this Court that:

> (i) any [non-settled Bank] shall be entitled to an affirmative defense to that portion of any claim by the Trustee that a lien granted to or a payment made to any [Bank] is subject to avoidance to the extent that, and only to the extent that, *the [Bank] establishes that granting the relief sought would result in an insured loss* or otherwise increase Generali's liability in respect of the Insurance above that which it would otherwise have in the absence of the Trustee's actions (determined without regard to whether the [Bank] has settled with or released Generali); and (ii) requiring that any settlement by the Trustee with a [non-settled Bank] shall include a release of the [Bank's] claims against Generali other than claims based on post-petition shortfalls in lease payments in accordance with the terms of the Insurance.

MOU, subsection (d) at 9-10 (emphasis added).

Similar treatment is afforded to the "Former Investors," defined as those Investors and lenders who had previously received payments from the Bennett lease program, but who were no longer owed money by the Debtors at the time of the bankruptcy filings. Because Former Investors are not presently creditors of the Estate, they are excluded from the Plaintiff Class and the Defendant Class.

Like the Banks, many of the Former Investors are defendants in avoidance adversary proceedings brought by the Trustee. The MOU and ¶ 15 of the Final Order grant these Former Investors a discontinuance of the adversary proceeding to the extent that their liability would lead to a cause of action against Generali, but the procedure that the Former Investors must follow in order to obtain this shelter is considerably less burdensome than that which must be followed by the Banks. Rather than being required to prove Generali's contingent liability, as the Banks apparently must do, the Former Investors are entitled to a discontinuance so long as they can simply produce a certificate of insurance, or if they are listed on Generali's master list of certificate-holders, or if they present "other evidence" satisfactory to the Trustee or the Court.

4. Provisions Relating to Brokers

Although not parties to the Settlement, the Brokers are potentially affected by two of its provisions: the Channeling Injunction, described above, and ¶ 5 of the Final Order, which provides that the claims of the Brokers other than Brighton Securities and Sage Rutty are dismissed with prejudice. This paragraph further provides that "[a]s to Brighton Securities and Sage Rutty, their claims in their capacities as loss payees on behalf of their customers are not dismissed; their claims in all other capacities, including without limitation as certificate holders or as assignees of certificate holders, are dismissed with prejudice."

From the pleadings before the Court, it appears that at least some of the Brokers face potential liability to their certificate-holder clients for losses incurred as a result of the Bennett investments which they had sold. With respect to clients who exited the Bennett investment program without losses, it appears that the Brokers will have potential liability only to the extent that the Trustee is able to force those clients to disgorge some or all of their investment return through an avoidance action. Under either scenario, it is conceivable that in the absence of the Settlement, the Brokers might look to Generali for a reimbursement of their losses. In addition, Brighton has asserted that it holds direct claims against Generali and the Estate, both as a purchaser of Bennett investments in its own right and as the assignee of certain causes of action originally belonging to its clients.

The Settlement specifically identifies five other Loss Payee Brokers in addition to Sage Rutty and Brighton Securities. One of these Brokers, Halpert and Company, has entered into a separate settlement with the Trustee which was approved by this Court pursuant to its Memorandum-Decision of March 18, 1999. Another Broker, Monarch Financial Corporation of

America, has answered the Trustee's Adversary Complaint but has not appeared in opposition to the Settlement Motion. A review of the Court's docket reveals that the remaining three Brokers (Horizon Securities, Bankers Financial Corporation, and Summit Financial Securities) have not answered the Trustee's Adversary Complaint or Amended Adversary Complaint. Accordingly, these non-answering Brokers are in default with respect to the declaratory determination of rights sought by the Trustee. *See Rivera v. Federal Deposit Insurance Corp.*, 711 F.Supp. 1156, 1164 (D.P.R. 1989).

DISCUSSION

Under Fed.R.Bankr.P. 9019, compromises and settlements entered into by a bankruptcy trustee require the approval of the bankruptcy court. *Nellis v. Shugrue*, 165 B.R. 115, 121 (S.D.N.Y. 1994). While the Bankruptcy Rules do not set out a standard by which such settlements are to be evaluated, a majority of courts have held that approval is to be granted if and only if the settlement is fair, reasonable, and in the best economic interests of the estate. *See Ehre v. New York (In re Adirondack Railway Corp.)*, 95 B.R. 9, 11 (Bankr. N.D.N.Y. 1988); 10 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY ¶ 9019.02 (15th ed. rev. 1999). In making this determination, courts will typically consider such factors as the Estate's probability of success in the litigation; the difficulties, if any, in the matter of collection; the complexity of the litigation involved; and the paramount interest of the creditors and a proper deference to their reasonable views. *See Rivercity v. Herpel (In the Matter of Jackson Brewing Company)*, 624 F.2d 605, 607 (5th Cir. 1980).

For convenience of discussion, the unresolved objections to the Settlement may be roughly divided into two groups. The first (and smaller) group of objections questions the impact of the Settlement on the Estate as a whole, as well as the methods by which the Trustee has chosen to bring this Settlement before the Court. The second group of objections deals with the particular treatment of certain interested parties, including the Banks, the Brokers, and the Abatemarco Investors.

A. GENERAL OBJECTIONS

1. Adequacy of the Settlement Amount

Nearly all of the creditors who appeared on this matter expressed satisfaction with the $125 million settlement amount, which the Trustee describes as an "extraordinary and unmitigated success" for the Estate. The lone exception appears to be the Abatemarco investors, who argue that the Trustee's motion does not provide creditors with enough information to decide whether or not the Settlement amount represents a fair exchange for the claims which are to be released. More particularly, the Abatemarcos assert that the Trustee's estimate of Generali's total potential liability is flawed in that it does not fully account for the liability-expanding effects of multiple-pledged and fraudulent leases. The Abatemarcos accordingly characterize the Settlement as a "bargain basement" disposition of the investors' rights which is not in the best interests of the Estate. *See* Abatemarco Objection (Jan. 28, 1999) at 5.

As the Abatemarco Investors correctly note, "[t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge

has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968). This does not mean, however, that a bankruptcy court is obligated to conduct an independent investigation or a miniature trial of each of the settled claims. Instead, the court may rely on the parties' own informed analysis of the strength of their claims and the probable outcome of the litigation. *See In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991)

The Trustee has stated that if he were able prove all the contract causes of action asserted against Generali while defeating each and every one of Generali's affirmative defenses, the total liability of Generali would be approximately $195 million. This outcome would require, among other things, a judicial determination that neither the "Second Trigger" nor the self-insured retention are enforceable on public policy grounds. The Trustee concedes that overcoming the self-insured retention defense will be the most difficult part of his case and that his chances of success on this issue are not high. If the Trustee is unable to void the deductible limits on the policies, but prevails on all other issues (including the unenforceability of the "Second Trigger"), the total liability of Generali would be approximately $128 million. If the "Second Trigger" is enforced, Generali's liability would drop to around $25.1 million, representing only those shortfalls in the leases that occurred after the Debtors entered bankruptcy. Finally, if Generali is able to prove that the policies are unenforceable in their entirety because of the Debtors' fraud, it might escape liability altogether. Contrary to the Abatemarcos' assertion, the preceding analysis

does take into account the effects of fraudulent and double-pledged leases.[8]

The Trustee believes that his tort claims would be less likely to succeed at trial than the contract claims. In order to prevail under any of the tort theories, it will likely be necessary for the Trustee to prove either that Generali had direct knowledge of the fraud, or that Generali would have had the power to stop the fraudulent scheme had it managed to discover it. According to the Trustee's Settlement Motion, preliminary discovery has not turned up evidence sufficient to prove either of these allegations. In any case, it appears that the total amount of compensatory damages recoverable under a tort theory would be no greater than the total amount which the Trustee has sought under the contract theories, and that the damages available under the two theories would substantially overlap. As a result, it appears that the Settlement amount is roughly comparable to the payoff of a near-perfect result for the Estate at trial, even ignoring the costs of litigation, which are likely to be considerable in a dispute of this magnitude and complexity.

In addition to the analysis contained in the Trustee's motion papers, an independent evaluation of the Settlement was undertaken by the law firm of Kohn, Swift & Graf as special counsel to the Official Committee of Unsecured Creditors (the "Committee"). While the specific contents of the Kohn, Swift report were filed under seal and will accordingly not be cited in this Decision, the Court notes that the Committee has continued to express strong support for the Settlement. Even in the absence of such expert investigation, the views of the Creditors'

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[8] The Trustee calculates Generali's total liability under the $128 million scenario by taking "the sum for all Contract pools of all monthly shortfalls between the amounts actually paid by lessees (or for future Contract payments, the amount estimated to be collected) *and the amounts due to investors in excess of the self-insured retention from 1990 until the last Contract is paid off*." (Settlement Motion at ¶ 25) (emphasis added). While a double-pledged or forged lease would arguably not be reflected in the amount of the lease-pool shortfalls, it would unquestionably be factored into the amount due to the Investors.

Committee would normally be given great weight in determining the economic impact of a settlement. *See Connecticut General Life Insurance Co. v. United Companies Financial Corp. (In the Matter of Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). For these reasons, the Court determines that the proposed Settlement Amount of $125 million is a fair and reasonable recovery for the combined claims of the Estate and Investors.

2. Failure to Allocate the Settlement Proceeds

Several parties, including the Abatemarcos and certain of the Banks, also objected to the Generali Settlement's unusual tactic of setting forth a fixed combined recovery for the Estate and the Plaintiff Class without at the same time determining how these proceeds would eventually be allocated among certificate-holding and non-certificate-holding creditors of the Estate. While no party has cited to any authority that is directly on point, the Court cannot necessarily conclude that such a tactic is improper. The bulk of the claims asserted against Generali by the Trustee and the Investors are mutually exclusive: Generali may have contract liability under the Policies to the Debtors as loss payee, or to the Investors as beneficiaries, but it is unlikely that Generali would have a contractual liability to both. The question of Generali's total liability is thus logically independent of the question of the eventual allocation among creditors, and as such, it cannot be seriously contended that the creditors have no basis on which to judge whether or not this was a favorable settlement. On the other hand, it is not unreasonable to suppose that the postponement of the allocation issue has greatly streamlined the settlement process, resulting in a faster and more efficient resolution of the claims against Generali, creating administrative savings which will ultimately inure to the benefit of the Estate. All interested parties will retain the right to object

to the allocation at a later time, and it does not appear that any party is prejudiced by the delay. Accordingly, Court finds that the Trustee's litigation strategy is well within the discretion with which bankruptcy trustees have traditionally been afforded. *See Society Bank, N.A. v. Sinder (In re Sinder)*, 102 B.R. 978, 984 (Bankr. N.D. Ohio 1989).

3. Objection to Settlement of the Generali Adversary Outside the Chapter 11 Plan.

A number of parties have also requested that the Court either reject or postpone approval of the Settlement on the grounds that it resolves disputes more properly addressed through a formal Chapter 11 plan of reorganization. The Court has rejected similar arguments at earlier stages of this case, *see In re The Bennett Funding Group*, Case No.96-61376*,* slip op. at 4 (Bankr. N.D.N.Y. October 28, 1998), and it rejects this objection in the present matter for substantially the same reasons.

It is well established that "[c]ompromises are 'a normal part of the process of reorganization.'" *TMT Trailer Ferry*, 390 U.S. at 424 (*quoting Case v. Los Angeles Lumber Prods. Co.,* 308 U.S. 106, 130, 60 S.Ct. 1, 14, 84 L.Ed. 110 (1939)). There is no prohibition against resolving a dispute through a Fed.R.Bankr.P. 9019 settlement rather than through a plan, even if the dispute concerns issues central to the entire reorganization (or liquidation); likewise, it is not necessarily improper to execute a settlement whose terms are conditioned on the inclusion of comparable terms in a plan of reorganization. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992). As there has been no showing of even the slightest prejudice or unfairness to any party as a result of this strategy, these objections to the Settlement are dismissed as without merit.

II. PARTICULARIZED OBJECTIONS

1. The Abatemarco Plaintiffs

The Abatemarco Plaintiffs have voiced strong opposition to the discharge of the Settled Claims in the Final Order, which will operate to bar them from pursuing breach-of-contract litigation against Generali while leaving their right to pursue tort claims intact. In principal part, the Abatemarcos note that this provision operates to enjoin one non-debtor from suing another, asserting that it therefore falls outside of this Court's subject matter jurisdiction and bankruptcy power.

The Abatemarcos concede, as they must, that if the breach-of-contract claims are property of the estate, this Court has both the core jurisdiction to adjudicate them as well as the inherent power to issue an injunction permanently barring their further prosecution. *See MacArthur v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 91 (2d Cir. 1988) (finding that the right to payment under a debtor's insurance policy was property of the estate and upholding an injunction that permanently enjoined tort victims from bringing actions against the insurer).

In an effort to distinguish the present case from *MacArthur*, the Abatemarcos attempt to characterize the Policies as "guaranties" rather than insurance. *See Mellon Bank v. Siegel*, 96 B.R. 505, 506 (E.D.Pa. 1989) (holding that the Bankruptcy Court had no power to enjoin a non-debtor from bringing an action against the debtor's guarantor). Even assuming that the Abatemarcos' distinction between guaranty and insurance had legal significance, it would be irrelevant to the present discussion. The assertion that the Policies were guaranties necessarily depends on the assertion that the Debtors had a valid obligation to reimburse Generali in the event that Generali

was forced to pay an Investor. *Id.* Like nearly everything else concerning the Policies, the issue of Generali's right to reimbursement is hotly disputed, and the Court cannot agree to any resolution of this issue as a matter of law.[9]

As noted earlier, however, the Contract Claims of the Trustee and of the Investors are mutually exclusive. As a result, any determination of the Investors' rights under the Policies vis-a-vis Generali will necessarily also be a determination of the Trustee's rights in the Policies. Actions which seek to determine the extent of a debtor's rights in such proceeds are considered core matters. *See Plaza at Latham Associates v. Citicorp North America*, 150 B.R. 507, 513 (N.D.N.Y. 1993); *Peterson v. 610 W. 142 Owners Corp. (In re 610 W. 142 Owners Corp.)*, 219 B.R. 363, 371 (Bankr. S.D.N.Y. 1998). Accordingly, the Court finds that all Investor Contract Claims are "matters concerning the administration of the estate" which it may hear and determine pursuant to its core jurisdiction under 28 U.S.C. § 157(b)(2)(A).

Finally, the Abatemarcos urge the Court to reject the Settlement on the grounds that it alters their rights to pursue contract claims without their consent. In this respect, the Abatemarcos seem to have either overlooked or ignored the existence of the Defendant Class of which they are members and whose duly-appointed representatives have signed on to the Settlement. Because of the need for a uniform resolution of the parties' competing claims to the Generali proceeds, the Court found it appropriate to certify the Defendant Class as a mandatory class under Fed.R.Civ.P. 23(b)(1) and (b)(2). Unlike the Fed.R.Civ.P. 23(b)(3) class certified in

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[9] In a further challenge to the Court's jurisdiction over the contract claims, the Abatemarcos offer several exhibits and arguments that are apparently designed to establish that as a matter of law, the right to payment under the policies is property of certificate holders (and not the Estate). The Court rejected these same arguments on a recent motion for summary judgment by the Abatemarco investors, and does not reconsider them here.

the District Court Litigation, the Defendant Class binds all persons who meet its definitional criteria, regardless of whether or not they desire to be excluded.[10] For both procedural and substantive reasons, the Court will not now reconsider its certification order. None of the Abatemarco investors' additional objections require further discussion.[11]

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[10] Fed.R.Civ.P. 23 provides, in part:

> **(b) Class Actions Maintainable**. An action may be maintained as a class action if . . .
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Pursuant to Fed.R.Civ.P. 23(c)(3), a class action which has been certified under either (1) or (2) of subsection (b) may be certified as a mandatory class, the members of which are not afforded an opportunity to opt out. If a class meets the requirements of (b)(3), but not (b)(1) or (b)(2), class members must be given notice and an opportunity to opt out. *See County of Suffolk v. Long Island Lighting Company*, 907 F.2d 1295, 1303 (2d Cir. 1990).

Fed.R.Civ.P. 23 is incorporated into the Federal Rules of Bankruptcy Procedure through Fed.R.Bankr.P. 7023.

[11] Among these additional arguments was a request by Counsel for the Abatemarco investors that the Court vacate its Order of October 28, 1998, which granted the Trustee approval to enter into settlements with certain current investors (the "Early Investor Settlement"), on account of certain alleged inconsistencies in the Trustee's description of the then-forthcoming Generali Settlement during the argument on that motion. The Court makes no ruling on the merit of this request, except to note that it is procedurally improper and irrelevant to the matter presently before the Court.

2. Objections of the Banks

Although the Generali Settlement purports to exclude the Banks entirely from its provisions, it drew a wide array of objections by various Banks when originally presented.[12] In the wake of several Bank-oriented modifications to the Settlement, only one particularized Bank objection remains unresolved: this is the differential treatment afforded to the creditor-Banks and Former Investors (including certain Former Investor Banks) under the Memorandum of Understanding.

Although the Trustee characterizes the affirmative defense provisions of the Memorandum of Understanding as a gift, this gift is concededly much more beneficial to the Former Investors than it is to the Banks. For the Former Investors, the provision ensures that the certificates of insurance will serve as total protection for any out-of-pocket losses, even if the Investors' status as certificate holders is later determined to be legally meaningless. By contrast, the Banks (who are loss payees) do not receive a defense merely by proving an insurance relationship between themselves and Generali; instead, they are required to prove further that their status as loss payees would allow them to recoup their litigation losses to the Trustee from Generali. This "benefit" is thus of doubtful practical utility to the Banks: in order to avoid liability, the Banks must prove the same issues and defenses, under the same burdens of proof, as they would have to prove in the absence of the Settlement.

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[12] In response to objections from the Banks, the Trustee filed an amendment to the Settlement on March 12, 1999 which removed language from the Final Order purporting to dismiss certain cross claims and counterclaims asserted by the Banks without prejudice. At the hearing of March 25, 1999, the parties additionally agreed to add language to the Final Order which affirmed that all rights of the Banks would remain intact as a result of the Settlement. This last amendment was formalized by the Second Modifying Agreement.

As potentially unsecured creditors of the Estate, the Banks have standing to argue that the benefit to the Former Investors is excessive, in that the amount of lost recoveries from these defendants exceed whatever compensation Generali has provided in return. However, it appears that the Estate's most valuable causes of action against the Former Investors are preference claims under Code § 547,[13] which will, however, create additional claims against the Estate if successful. *See Gander Mountain, Inc. v. Beatrice Foods Co. (In re Gander Mountain, Inc.)*, 29 B.R. 269 (Bankr. E.D. Wisc. 1983). Because the real value of these actions would thus be diluted even should the avoidance claims succeed, the Court finds a reasonable basis for the Trustee's decision to grant the insured Former Investors a discontinuance in return for an apparent premium from Generali.[14]

The main contention of the Banks, however, seems to be that having offered this benefit to one group of defendants, the Trustee is obligated to make the same offer to the other avoidance defendants. It would be absurd, of course, to assume that the Banks and Former Investors must be treated alike in all respects. The Banks are self-described secured creditors who hold considerable pending claims against Generali and the Estate even in the absence of this Settlement; the Former Investors are presently non-creditors who are connected to this case only to the extent that the Trustee has chosen to bring avoidance actions against them. At the same

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[13] The Trustee has elsewhere noted that the vast majority of Former Investors are likely to raise successful good-faith defenses under Code § 548(c), which would greatly limit the amount of payments which the Trustee would be able to avoid as fraudulent transfers under Code § 548(a)(1).

[14] In spite of the numerous objections and responses that have been filed concerning the Memorandum of Understanding, it appears that no creditor is opposed to the treatment of the Former Investors *per se*.

time, the Court does not suggest that the Trustee has an unrestrained ability to selectively forgive alleged preferences under Fed.R.Bankr.P.9019. Were eligibility for the defense determined by a purely irrational factor, such as one's hair color or political affiliation, the Court would have little hesitation in finding that the proposed settlement was neither fair nor reasonable. As such, the permissibility of such plainly disparate treatment afforded to these two groups of defendants depends on a simple balancing inquiry: is the magnitude of the disparate treatment justified by the degree to which the Banks and the Former Investors are differently situated?

In an affidavit which accompanied the Amended Motion, the Trustee asserted that the disparate treatment of Banks and Former Investors was a reflection of the demands made by Generali. The Trustee noted that the Banks are presently engaged in litigation with Generali, and will continue to assert claims for post-petition lease shortfalls even if the avoidance actions which have been commenced against them by the Trustee are dismissed outright. The Former Investors, by contrast, will have claims against Generali if and only if they are found liable to the Trustee. Generali thus faces arguably higher marginal litigation costs against the Former Investors than against the Banks, since much of its litigation expenses against the Banks have already been incurred or are bound to be incurred independently of the Trustee's avoidance actions. Because of this, it is reasonable to suppose that Generali places a slightly higher value on ensuring a defense for the Former Investors than for the Banks and that such a difference in value has been reflected in the amount of the Settlement.

A second distinction (which was raised at oral argument, though not in the Trustee's affidavit) is that the avoidance claims against the Banks are far more likely to be collectable than his avoidance claims against the Investors. The reason for this is not the different economic status

of the two defendant groups,[15] but rather in the fact that any avoidance recovery by the Trustee against the Banks might at least in part be used to offset an affirmative recovery by the Banks against the Estate. In such an event, the process of collection would be nearly costless for the Trustee, and the probability of successful collection would be certain. As such, the real value of an avoidance claim against a Bank should be more valuable to the Trustee than an avoidance action against a Former Investor, from whom successful collection might be both expensive and uncertain.

The parties to this motion have not cited to any reported case dealing with the standards for discriminatory treatment among creditors and defendants in the context of a Fed.R.Bankr.P. 9019 motion. There is, however, an extensive body of analogous law relating to creditor discrimination under Code § 1129(b)(1) and the standards for imposing a cram-down upon a dissenting class in a Chapter 11 plan confirmation. Under that section, courts have routinely denied claims of unfair discrimination between creditors of unequal non-bankruptcy priority, *see Prudential Ins. Co. of America v. Monnier (In re Monnier Bros.)*, 755 F.2d 1336, 1342 (8th Cir. 1985), and have upheld disparate treatment of creditors where the discrimination could be justified because of its financial impact on the Estate. *See In re Kliegl Bros. Universal Elec. Stage Lighting Co.*, 149 B.R. 306, 308 (Bankr. E.D.N.Y. 1992). Accordingly, the Court cannot conclude that the provision of the MOU concerning the Banks and Former Investors "falls below the lowest point in the range of reasonableness," *see In re Bell & Beckwith*, 93 B.R. 569, 574 (Bankr. N.D. Ohio 1988), and the particularized objection of the Banks to the Generali Settlement is dismissed.

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[15] While the vast majority of the Former Investors are individuals, it appears that the Former Investors also include entities which, like the Banks, are institutions.

3. Objections of the Brokers

Finally, Sage Rutty and Brighton Securities initially objected to the Settlement on the grounds that they are potentially liable for damages to their clients, largely Former Investors, who are also being sued in avoidance actions by the Trustee. As a result, the Brokers argued, the Settlement would potentially destroy their right of recourse to Generali while leaving them fully exposed to their own clients. In response to these concerns, Generali consented to a further modification of the Final Order which preserved the right of recourse of these two Brokers against Generali in the event of such litigation. The Court concludes that as a result of this modification, Sage Rutty and Brighton Securities will not be prejudiced by the Settlement, and their objections are rendered moot.[16]

Based on the foregoing, the Trustee's Motion Pursuant to Fed.R.Bankr.P. 9019 for an

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[16] An additional objection to the treatment of the Sage Rutty and Brighton Securities is raised in a letter by counsel for the Abatemarco Investors, which was received by the Court on April 2, 1999. In pertinent part, the letter questions the fairness of the exemption for these Brokers, noting that "[w]hile preserving (at least in part) the rights of Brighton Securities and Sage Rutty investors, the Final Order and Judgment divests all other individual investors of their contract claims against Generali."

This last objection by the Abatemarco Investors appears to misunderstand the effect of the exemption granted to Sage Rutty and Brighton Securities. Like all other members of the Defendant Class, the certificate holders who purchased securities through these brokers will have their contract claims released by ¶ 7 of the Final Order. These investors will be able to pursue their claims against the Brokers regardless of whether the Brokers retain their own rights against Generali. If some of the Investors are in a better position than others, it is only because they purchased securities under circumstances which might allow them to recover damages from a solvent party in addition to the Debtors and Generali. Even assuming that there was unfairness in this situation, such unfairness pertains only to non-bankruptcy rights between and among non-debtors. Consequently, in addition to the irrelevance of the Abatemarco's objection to the present matter, the alleged unfairness appears to be of a sort that the Court lacks the power or jurisdiction to correct.

Order Authorizing the Consolidated Estate to Enter into Settlements with and among Generali, Halpert and Company, Inc., and Investor Classes, as amended on March 12, 1999, March 25, 1999, and April 1, 1999, is hereby

GRANTED in its entirety, except to the extent that any part of the Settlement Motion has been previously denied by virtue of the Court's Decision of March 18, 1999, and it is further

ORDERED that the Final Order and Judgment submitted by the Trustee as Exhibit G of the Settlement Motion and amended on March 12, 1999, March 25, 1999, and April 1, 1999, is incorporated into this Order by reference and as attached hereto as "Appendix."

Dated at Utica, New York
this 9th day of April 1999

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

APPENDIX

FINAL ORDER AND JUDGMENT PURSUANT TO RULE 54(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RULE 7054 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

This Final Order and Judgment is entered upon plaintiff's motion for approval of a settlement and compromise of the claims presented in this proceeding (the "Settlement") as stated in that certain Stipulation entered into on December 21, 1998, as amended, including that certain Memorandum of Understanding entered into as of October 19, 1998 and the other exhibits thereto, by Assicurazioni Generali, S.p.A., Generali U.S. Branch and Generali Underwriters, Inc. with plaintiff in this action, Richard C. Breeden, as trustee, with the representatives of the plaintiff class (the "Plaintiff Class") in In re Bennett Funding Group, Inc. Securities Litigation, 96 Civ. 2583, a consolidated class action pending in the United States District Court for the Southern District of New York, and with representatives of the defendant class in this proceeding, after a hearing on notice to all parties to this action, to all members of the defendant class, and to all creditors in the related substantively-consolidated bankruptcy cases.

1. For purposes of this Final Order and Judgment:

"Generali" means Assicurazioni Generali S.p.A., Generali U.S. Branch and Generali Underwriters, Inc., their respective predecessors, successors (other than for claims against a successor that arose independently of the successor"s relationship to Assicurazioni Generali S.p.A., Generali U.S. Branch and Generali Underwriters, Inc.), parents, subsidiaries, partners and affiliates, the present and former officers, directors, employees, agents and attorneys of each of the foregoing persons and entities, the heirs and assigns of each such present or former officer,

director, employee, agent and attorney, and Diversified Business Systems, Patrick Bowling and each and every other insurance broker and broker employee involved in issuance of insurance by Generali U.S. Branch to The Bennett Funding Group, Inc. or any of its affiliates.

"Trustee" means Richard C. Breeden, plaintiff in this action, as trustee for and on behalf of debtors The Bennett Funding Group, Inc., Bennett Management and Development Corporation, Bennett Receivables Corp., Bennett Receivables Corp. II, Aloha Capital Corporation, The Processing Center, Inc., American Marine International, Ltd. and Resort Service Company, Inc. and their substantively- consolidated bankruptcy estate, as assignee of the Included Banks (as defined herein), and personally.

The "Defendant Class" means the defendant class certified in this proceeding and includes all creditors of BFG or the Estate who assert claims against Assicurazioni Generali, S.p.A., Generali U.S. Branch or Generali Underwriters, Inc. in connection with their transactions with BFG, and the heirs, successors, transferees and assigns of all such persons and entities, except the following: (1) persons or entities who are named as loss payees on certificates of insurance issued with respect to policies issued by Generali U.S. Branch to The Bennett Funding Group, Inc. and to the corporation now known as Resort Service Company, Inc; and (2) persons or entities who are not named as loss payees but who are banks, bank and trust companies, trust companies, savings and loan associations or other financial institutions (collectively "non-loss payee financial institutions"), provided that such non-loss payee financial institutions appeared and answered the Adversary Complaint in this proceeding no later than May 30, 1997 (unless such date was extended by the Court). Such exceptions include, without limitation, all Crossclaim Defendants listed in Paragraph 6 of Generali's Amended Answer and Amended Counterclaim/Crossclaim

dated December 18, 1996.

"Broker Loss Payees" means brokers who were listed as loss payees on certificates referencing insurance policies issued by Generali U.S. Branch to The Bennett Funding Group, Inc. or its affiliates and that list a customer of the broker as certificate holder and includes defendants Bankers Financial Corp., Brighton Securities, Halpert and Company, Inc., Horizon Securities, Monarch Financial Corporation of America, Sage Rutty and Company and Summit Financial Securities.

"Included Banks" means banks that are listed as loss payee and certificate holder on certificates or declarations referencing insurance policies issued by Generali U.S. Branch to The Bennett Funding Group, Inc. or one of its affiliates and that have assigned their insurance claims to the Trustee. Each Included Bank is listed on Exhibit A hereto.

"Excluded Banks" means banks that are listed as loss payee and certificate holder on certificates or declarations referencing insurance policies issued by Generali U.S. Branch to The Bennett Funding Group, Inc. or one of its affiliates and that have not assigned their insurance claims to the Trustee. Each Excluded Bank is listed on Exhibit B hereto.

"BFG" means The Bennett Funding Group, Inc., Bennett Management and Development Corporation, Bennett Receivables Corp., Bennett Receivables Corp II, Aloha Capital Corporation, The Processing Center, Inc., American Marine InternationalN, Ltd. and Resort Service Company, Inc.

"Estate" means the substantively-consolidated bankruptcy estate of BFG.

"Settled Claim" means:

(a) each and every claim of the Trustee, (including without limitation as assignee),

BFG, the Estate, Resort Funding, Inc., Equivest Finance, Inc., the Included Banks, and Halpert and Company, Inc. against Generali pertaining in any matter to BFG, to any insurance policy issued to BFG by Generali U.S. Branch or to any declaration or certificate thereunder, or to any transaction between BFG and any creditor of BFG;

(b) each and every claim of each and every member of the Defendant Class and of each and every Loss Payee Broker, excluding Brighton Securities and Sage Rutty in their capacities as loss payees on behalf of their customers but including Brighton Securities and Sage Rutty in all other capacities including without limitation as certificate holders or assignees of certificate holders, against Generali seeking payment of proceeds of any insurance,policy issued by Generali to BFG or otherwise alleging Generali's breach of its obligations under any such policy or any declaration or certificate issued in connection with any such policy; and

(c) each and every claim of each and every member of the Defendant Class against Resort Funding, Inc. (formerly known as Bennett Funding International, Ltd.) and Equivest Finance, Inc. pertaining in any manner to BFG, to any insurance policy issued by Generali U.S. Branch to BFG or to any declaration or certificate thereunder, or to any transaction between any creditor of BFG and Resort Funding, Inc., Equivest Finance, Inc. or BFG, provided, however, that the release of claims against Resort Funding, Inc. and Equivest Finance, Inc. does not apply to the short term bonds issued by Bennett Funding International, Ltd. nor to the outstanding obligations under Resort Funding, Inc.'s notes that were exchanged for short term bonds issued by Bennett Funding International, Ltd.

2. Notice of the hearing on the Settlement is approved as reasonable and sufficient.

3. The Settlement is approved as fair, reasonable and adequate and in the best interests

of the Estate and its creditors. All objections to the Settlement are overruled.

4. The Settled Claims are dismissed, on the merits and with prejudice.

5. The claims of plaintiff against defendants are dismissed with prejudice (but such dismissal shall be without prejudice to plaintiff's rights under the Settlement or under his settlements with the various Included Banks). The claims of the Included Banks, the Loss Payee Brokers other than Brighton Securities and Sage Rutty, and the Defendant Class against Generali or against the plaintiff are dismissed with prejudice. As to Brighton Securities and Sage Rutty, their claims in their capacities as loss payees on behalf of their customers are not dismissed; their claims in all other capacities, including without limitation as certificate holders or as assignees of certificate holders, are dismissed with prejudice.

6. The Settled Claims are released and discharged.

7. The plaintiff, BFG, the Estate, Resort Funding, Inc., Equivest Finance, Inc., the Included Banks and each and every member of the Defendant Class are permanently barred and enjoined from commencing or continuing any litigation, arbitration or other proceeding against Generali in respect of any Settled Claim.

8. Section 15-108 of the New York General Obligations Law is applicable to the release provided by this Final Order and Judgment. The claims of the plaintiff, BFG, the Estate, Resort Funding, Inc., Equivest Finance, Inc., the Included Banks and each and every member of the Defendant Class against persons other than Generali, are subject to reduction, and Generali is relieved from liability for contribution, accordingly.

9. Generali has not conceded liability, fault or wrongdoing of any kind and the plaintiff, BFG, the Estate and the Defendant Class acknowledge that Generali is entering into this

settlement solely in order to avoid the burden and expense of further litigation. Neither this Final Order and Judgment nor any act or statement associated with the Settlement nor the negotiations leading thereto is admissible in any litigation, arbitration or other proceeding as evidence of Generali's alleged liability, fault or wrongdoing of any kind.

10. Each party to the Settlement shall bear its own costs and the fees and expenses of its counsel, except to the extent the District Court presiding over the Bennett Funding class action awards payment of fees and reimbursement of expenses from the proceeds of the Settlement to counsel for the Plaintiff Class and the Defendant Class or to the extent this Court awards fees or expenses to the Trustee or his counsel from the Estate.

11. Generali's payment obligations under the Settlement and this Final Order and Judgment shall be fully and completely discharged when the letter of credit provided for under the Memorandum of Understanding is fully drawn down and interest on the settlement amount is paid as provided for under the Memorandum of Understanding.

12. Proceeds of the letter of credit established pursuant to the Settlement, net of amounts used to fund the Generali Special Litigation Reserve Account as described in the Memorandum of Understanding and net of amounts awarded as fees and expenses of counsel for the Plaintiff Class and the Defendant Class, and interest paid by Generali pursuant to the Settlement, are property of the Estate. Distribution of such amounts is subject to the jurisdiction of this Court.

13. This Final Order and Judgment shall be vacated upon a showing by the plaintiff or by counsel for the Defendant Class that the letter of credit provided for under the Settlement has not been drawn upon and has been canceled.

14. The terms of the Settlement are not merged into this Final Order and Judgment and remain binding upon the parties thereto, who are directed to implement its provisions. Without limiting the foregoing, the parties to the Settlement are authorized and directed to exchange releases as provided by the Settlement, and the Trustee is authorized and directed to implement the provisions of paragraphs 1(b), 1(c), 1(d), 3 and 9 and the other provisions of the Memorandum of Understanding. This Court retains jurisdiction to enforce the Settlement and this Final Order and Judgment.

15. Proceedings commenced by the Trustee against persons or entities who are not creditors of the Estate but who purchased a security or instrument sold or issued by or through BFG or who loaned money to BFG (the "Former Investors and Lenders") to recover payments made by BFG to such persons or entities shall be dismissed with prejudice to the extent that such proceedings seek recovery of payments to such Former Investors and Lenders that were made in respect of investments or loans that were the subject of insurance provided by Generali (the "Insurance"); if the relevant payments relate to some investments that were and to other investments that were not the subject of Insurance, the Trustee's claims shall be amended to relate only to payments in respect of investments that were not the subject of Insurance. Each and every Former Investor and Lender shall have an absolute defense to each and every claim by the Trustee to the extent that the investment of the Former Investor and Lender was the subject of Insurance. Former Investors and Lenders will be entitled to have the Trustee's actions against them dismissed with prejudice to the extent their investments or loans were the subject of Insurance if they (i) have a certificate or other evidence of such Insurance, (ii) appear on the lists of certificate holders, maintained by Generali, or (iii) present other evidence satisfactory to the Trustee or, if not

satisfactory to the Trustee, to the Bankruptcy Court that their investment was the subject of Insurance. To the extent that an investment of a Former Investor or Lender was not the subject of Insurance, the Trustee shall reduce the amount of the recovery, if any, from the Former Investor or Lender by the amount the trier of fact determines that Generali would be liable to the Former Investor or Lender with respect to such award of damages to the Trustee. This Final Order and Judgment shall not limit Generali's right to seek a determination of its liability, if any, to Former Investors and Lenders in a declaratory judgment action or as intervenor or third-party defendant in the Trustee's adversary proceedings against such Former Investors and Lenders, nor does this Final Order and Judgment modify the Trustee's obligation under the Settlement to obtain from any Former Investor or Lender with whom the Trustee settles a release of any and all claims of the Former Investor or Lender against Generali.

16. Each Excluded Bank shall be entitled to an affirmative defense to that portion of any claim by the Trustee that a lien granted to or a payment made to the Excluded Bank is subject to avoidance to the extent that, and only to the extent that, the Excluded Bank establishes that granting the relief sought would result in an insured loss under or otherwise increase Generali's liability in respect of the Insurance above that which it would otherwise have in the absence of the Trustee's actions (determined without regard to whether the Excluded Bank has settled with or released Generali). This Final Order and Judgment shall not limit Generali's right to seek a determination of its liability, if any, to any Excluded Bank in a declaratory judgment action or as intervenor or third-party defendant in the Trustee's adversary proceeding against such Excluded Bank, nor does this Final Order and Judgment modify the Trustee's obligation under the Settlement to obtain from any Excluded Bank with which the Trustee settles a release of any and all claims, other than claims based on post-petition shortfalls in lease payments in accordance with

the terms of the Insurance, of the Excluded Bank against Generali. The release to be given by the Trustee to Generali pursuant to the settlement shall not affect the claims of an Excluded Bank as loss payee or the claims or defenses of Generali relating to any such claim.

17. There being no just reason for delay, the Clerk is directed to enter this Final order and Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (made applicable by Rule 7054 of the Federal Rules of Bankruptcy Procedure).

Settled Banks

Abrams Centre National Bank
American National Bank of Union Springs, Alabama
Amerifirst Bank, NA
Amsterdam Savings Bank
Androscoggin Savings Bank
Ballston Spa National Bank
Bank of Bellevue
Bank of Mt. Carmel
Bank of Mt. Carmel Trust Department
Bank of Newberry
Bank of St. Petersburg
Bank of Sunset & Trust Co.
Bank of the Mountains
Bank of Tioga
Bankfirst
Banterra Bank of West Frankfort
Bay Area Bank
Bay State Savings Bank
BayBank
Bayside Federal Savings & Loan Association
Berkshire County Savings Bank
Caldwell National Bank
Canton Federal Savings & Loan Association
Carterville State and Savings Bank
CenBank f/k/a a State Bank of Buffalo Lake
Central Bank & Trust
Central National Bank, Canajoharie
Central State Bank, Muscatine, Iowa
CIB Bank f/k/a Bank of Hillside
Citizens Bank of Corydon
Citizens Bank of Hickman
Citizens Bank of Leon

Citizens Bank of Princeton
Citizens National Bank of Albion
Citizens National Bank of Albion, as Agent for Richard D. Shaw and Phyllis J. Shaw
Citizens National Bank of Albion, as Agent for Ronald B. Shaw and Phyllis J. Shaw
Citizens National Bank of Malone
Citizens State Bank, Arlington, SD
Citizens State Bank of Milford
Citizens State Bank of Shipman
Citizens State Bank of St. James
City First Bank
City National Bank and Trust Company, Gloversville
City National Bank and Trust Company, Hastings
City State Bank
Community Bank, N.A.
Community Bank, FSB, Michigan City, IN
County Bank
Crawford & Associates, Ltd.
Crawford & Associates, Defined Pension Plan
Crawford & Associates, Profit Sharing Plan
Cumberland Security Bank, Somerset, KY
De Anza National Bank
Dime Savings Bank of Norwich
DJ Mead, Hubbs & Howe, Inc.
Douglas County Bank & Trust Co.
Douglas Federal Bank, FSB
East Side Bank & Trust Co.
Eaton National Bank & Trust Company
English State Bank
Equitable Bank f/k/a Compass Bank
Etowah Bank, Canton
Exchange Bank of Alabama
Fairfield National Bank
Farmers & Merchants Bank of Milford
Farmers & Merchants Bank of Watertown
Farmers & Merchants Bank, Summerville, GA
Farmers and Merchants Bank of Miamisburg
Fidelity Federal Savings Bank
First Bank National Association f/k/a American Bank
First Citizens National Bank
First Federal Bank, FSB
First Federal Savings Bank of LaGrange
First Federal Savings Bank of Corydon
First Keystone Federal Savings Bank
First National Bank & Trust Company of Carbondale
First National Bank & Trust Company of Ponca City
First National Bank & Trust Company of Williston

First National Bank in New Bremen
First National Bank in Newton
First National Bank in Pinckneyville
First National Bank of Alachua
First National Bank of Bridgeport
First National Bank of Central City
First National Bank of Central Florida
First National Bank of Herminie
First National Bank of Longmont
First National Bank of McCook
First National Bank of Ottawa
First National Bank of Waconia
First Security Federal Savings Bank
First State Bank of Harvard
First State Bank of Livingston
First State Bank of Red Wing
First State Bank of Sauk Centre
First State Bank of Wyoming
First United Bank successor to Seaboard Savings Bank
Framingham Co-operative Bank
Goodland State Bank
Grand Marais State Bank
Great Falls Bank
Greater Delaware Valley Savings Bank
Greene County Savings Bank
Grinnell Federal Savings Bank
Hawkeye Federal Savings Bank f/k/a Commercial Federal Savings Bank
Hillcrest Bank
Home Federal Savings & Loan Association of Nebraska
Hudson United Bank
Illini State Bank
Indiana Lawrence Bank
Interchange State Bank
Iowa State Bank
Iron and Glass Bank
Jacobs Bank
Jefferson State Bank
LaFayette Savings Bank
LaFayette Savings Bank
Leavenworth National Bank
Liberty Bank
Lockport Savings Bank
Longview National Bank
Medway Savings Bank
Melrose State Bank
Mercantile Bank of Southern Illinois f/k/a First Bank & Trust Co.

Merchants Bank fka Texas City
Merchants State Bank of Lewisville, MN
Middletown Savings Bank
Minnesota Bankfirst f/k/a Bankfirst
Monroe County Bank
Mutual Federal Savings Bank of Plymouth County
National Bank of Redwoods
New Carlisle Federal Savings Bank
North Adams Hoosac Savings Bank
North County Bank f/k/a First Northern B&T
Norwood Cooperative Bank
Ocala National Bank
Oswego City Savings Bank
Palos Bank and Trust Co.
Park West Bank and Trust Co.
Peoples Bank, Lebanon, KY
Peoples Bank, Sandy Hook, KY (in its own right and as agent for C. Louis Caudill)
Peoples Trust Company
Perpetual Federal Savings Bank of Urbana, Ohio
Pioneer Bank
Plattsmouth State Bank
PNC Bank National Association, successor in interest to midlantic Bank, assignee of Bank & Trust of Old York Road a/k/a York Bank Pennsylvania
Republic Bank
Rhinebeck Savings Bank
Rocky Mountain Bank f/k/a Security State Bank
Rome Savings Bank
Roundbank
Roxborough Manayunk Federal Savings and Loan
Safety Fund National Bank
Sand Ridge Bank f/k/a Bank of Highland
Savings Bank of the Finger Lakes
Scandia American Bank
Security Bank, FSB successor to Security Federal Savings & Loan of Springfield
Security Federal Savings and Loan Association of Chicago
Security Federal Savings Bank, Logansport
Seneca Federal Savings & Loan
Skylands Community Bank
Smith County Bank a branch of Citizens Bank of Lafayette
Sofco-Mead, Inc. (including SQP, Inc., ESOP)
Southeastern Bank
Southtrust Bank of Georgia, NA f/k/a Bankers First Savings Bank, FSB
Spring Hill Savings Bank
St. Henry Bank
State Bank of LaCrosse
State Bank of Oliver County

Stearns County National Bank
The Bank of Herrin
The Bank of Ohio County
The Bank of Tioga
The Equality State Bank
The Equity Bank
The Exchange Bank of Alabama
The First National Bank of Elmore n/k/a Pioneer Bank
The First National Bank of Mapleton n/k/a Pioneer Bank
The First National Bank of Cold Spring
The First National Bank of Dieterich
The First National Bank, Portland, IN
The First State Bank of Barboursville
The Flat Top National Bank f/k/a First Community Bank of Mercer Co., Inc.
The Harrisburg National Bank n/k/a Citizens Bank of Illinois
The Hibernia Savings Bank
The Hicksville Bank
The John Warner Bank
The National Bank of Coxsackie
The Overland National Bank
The Poples Bank and Trust Co.
The Potters Savings and Loan Company
The St. Henry Bank
The Third Savings and Loan Company
The Tupper Lake National Bank
The Union Bank Company
Third Federal Savings Bank
Tracy State Bank
Twentieth Street Bank
Valley Bank n/k/a Citizens Bank of Western Indiana
Washington Savings Bank n/k/a Roosevelt Bank
Watseka First National Bank
Weakley County Bank
West End Savings Bank
Western Bank of Wolf Point
William Penn Savings & Loan Association
Willow Grove Bank
Yoakum National Bank

Non-Settled Banks

Amcore Bank, Rockford
American Community successor to Citizens Loan and Building
American Federal Bank f/k/a Northwestern Savings Bank, FSB
American State Bank & Trust of Williston
American Trust Federal Savings Bank
Bank of Utica
Citrus Bank
Commercial Bank
Deposit Bank
ESB f/k/a Economy Savings Association
Farmers State Bank
First Community
First Federal Savings & Loan Association of Galion
First National Bank Northwest Ohio
First National Bank of Carmi
First National Bank of Carmi, as agent for Absher Oil
First National Bank of Carmi, as agent for Henry Absher
First National Bank of Carmi, as agent for Jane Absher
First National Bank of Carmi, as agent for Ron Absher
First National Bank of Crockett
First Star Savings Bank f/k/a Greater Bethlehem Savings and Loan Association
First State Bank of Wabasha
First United Security Bank
Firstar Bank f/k/a Harverst Savings Bank
Gloucester Bank
Heller Financial
La Crescent State Bank
Marine Midland
Manufacturers & Traders Trust Company f/k/a Endicott Trust
Merchants National Bank of Winona
MetroBank

Minnesota Valley Bank
Norwest Bank of Red Wing
Oxford Bank & Trust
Security Bank
Sprague National Bank
State Bank & Trust of Seguin
Stoneham Savings Bank
Story County Bank & Trust
The Howard Bank
Tolland Bank
Tucker Federal Savings & Loan
Union State Bank
Wilber National Bank